

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
RISEANDSHINE CORPORATION,

Plaintiff,

-v-

PEPSICO INC.,

Defendant.

CIVIL ACTION NO.: 21 Civ. 6324 (LGS) (SLC)

**ORDER**

**SARAH L. CAVE**, United States Magistrate Judge.

On May 6, 2022, the Court held a lengthy conference regarding several discovery disputes raised by Plaintiff RiseandShine Co. (“RiseandShine”) and Defendant PepsiCo, Inc. (“Pepsi”). (ECF min entry May 6, 2022; see ECF No. 274). In an order following the conference, the Court reserved final judgment on certain issues, pending, inter alia, receipt of additional submissions from the parties. (ECF No. 266).

Having reviewed the parties’ additional submissions (ECF Nos. 282, 285), and having heard further arguments from the parties during a nearly two-hour discovery conference held today, May 31, 2022, the Court orders as follows:

1. Pepsi’s request for an order compelling RiseandShine to produce third-party communications on the use of “Rise” that RiseandShine withheld as irrelevant under Fed. R. Evid. 408 (ECF No. 223 at 2) is GRANTED IN PART to the extent that RiseandShine shall promptly produce the July 11, 2019 and October 16, 2019 letters sent by counsel for RiseandShine to counsel for Rise Biscuits Donuts LLC, and otherwise DENIED.

2. Pepsi's request for an order compelling RiseandShine to produce third-party communications that RiseandShine withheld as privileged (ECF No. 223 at 2–3) is GRANTED IN PART to the extent that RiseandShine shall promptly produce the document identified on RiseandShine's privilege log as Entry No. 996 (see ECF No. 282-1 at 3), and is otherwise DENIED.
3. Pepsi's request for an order compelling RiseandShine "to correct deficiencies with its production of text messages" (ECF No. 223 at 3) is GRANTED IN PART to the extent that, for the text-message conversations identified in RiseandShine's log (ECF No. 282-2) as beginning with Bates Nos. RISE0028413, RISE0028448, and RISE0028449, RiseandShine shall promptly provide Pepsi with the date and time of each text message appearing in these conversations, and is otherwise DENIED.
4. RiseandShine's request for an order compelling Pepsi to produce "its documents regarding the unaired Super Bowl ad" (ECF No. 229 at 3–4) is GRANTED IN PART to the extent that Pepsi shall promptly produce any documents reflecting the reason for Pepsi's decision not to run the Super Bowl advertisement, and is otherwise DENIED.
5. RiseandShine's request for an order compelling Pepsi "to supplement its production of financial documents in response to Rise Brewing's First Requests for Production, Nos. 19, 21, and 33" (ECF No. 229 at 1–2) is GRANTED IN PART to the extent that, for MTN DEW RISE ENERGY, Pepsi shall promptly conduct a reasonable search for and produce (i) any quarterly brand-level profit-and-loss statements ("P&Ls") and (ii) to the extent they exist, any monthly or annual brand-level P&Ls, and is otherwise

DENIED. RiseandShine's request for an order compelling Pepsi to produce brand-level P&Ls for MTN DEW ENERGY is DENIED WITHOUT PREJUDICE.

6. RiseandShine's request for an order compelling Pepsi "to provide documents responsive to Rise Brewing's Second Requests for Production, Nos. 55, 56, 57, 59, and 60, . . . and provide a substantive response to [RiseandShine]'s Interrogatory No. 20," (ECF No. 229 at 2–3) is GRANTED IN PART to the extent that (i) Pepsi shall promptly produce any documents relating to the pricing of Starbucks Nitro in relation to RiseandShine's products, (see e.g., ECF No. 183-10), and (ii) before the June 8, 2022 deposition of Ryan Collis,<sup>1</sup> Pepsi shall produce any documents responsive to Request No. 2, as set forth in the Court's April 14, 2022 Order (see ECF No. 221 ¶¶ 1.b.i).

The parties are directed to order a transcript of today's conference.

Dated: New York, New York  
May 31, 2022

SO ORDERED.

  
SARAH L. CAVE  
United States Magistrate Judge

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<sup>1</sup> Pursuant to the parties' agreement (see ECF No. 285 at 3 n. 4), Mr. Collis' deposition shall be limited to three and a half (3.5) hours.